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ABSTRACT

Professional standards of practice for psychologists are vital in child custody work. The psychologist should examine all parties involved and should be acutely aware of and compliant with the current state laws as related to child custody. Objectivity is of paramount importance. This can best be achieved if the psychologist is appointed by the judge as a friend of the court. The psychologist should be satisfied that the report fairly represents the psychologist's opinion regardless of who is paying the bill. While psychology tests may be of some value in determining levels of intelligence, existence of mental disorders, etc., there is no substitute for thorough examinations of the parents individually, of the child or children individually and of the child or children as they interact with the parents. Further, the psychologist should contact the grandparents, neighbors, employers, etc., to get as complete a picture as possible. Although it is a cliche, the psychologist should only be concerned about the best interest of the child or children as it relates to the specific standards of the particular state's laws. (Author/ABL)

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American Psychological Association, August 14, 1988

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Professional Standards of Practice in Child Custody

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The purpose of this paper is to argue that the professional standards of practice are vital in child custody work. At the very least, the psychologist should examine all parties involved and should be acutely aware and compliant to the current state laws as related to child custody. Several different state laws will be presented to illustrate the variability that exists from state to state.

Objectivity is of paramount importance. This can best be achieved if the psychologist is appointed by the judge as a friend of the court. At the very least, the psychologist should go through the exercise of assuming the other party is paying his or her bill and then asking, "Would I say the same thing?" The report should be modified until the psychologist is satisfied that the report fairly represents the psychologist's opinion regardless of who is paying the bill.

While psychology tests may be of some value in determining levels of intelligence, existence of mental disorders, etc; there is no substitute for thorough examinations of the parents individually, child or children individually and of the child or children as they interact with the parents. Further, the psychologist should contact grandparents, neighbors, employers, etc. to get as complete a picture of the situation as possible.

Though it is a cliche, the psychologist should only be concerned about the best interest of the child or children as the best interest relates to the specific standards of the particular state law.

Professional Standards of Practice in Child Custody Examinations

Robert J. Howell

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The role of experts in giving advice and opinions in custody examinations has assumed increasing importance during the past two decades. While experts were often used prior to the concept of best interests of the child doctrine, except in unusual cases, experts were not needed. This was the result of very rigid laws. Until the 1900's the father was almost always awarded custody of the children because it was believed that he could best provide for their food, clothing and shelter, since he was the assumed provider for the family. The tender-years doctrine was first recognized in 1839, when a judge awarded the custody of a 21-month old child to the mother because of the child's "tender years." The child's custody was changed to the father when the child was four years of age.

In 1925, Judge Cordoza introduced the doctrine of the best interests of the child. This was interpreted to mean that the mother would have custody of the child, partly because the father was thought to be away from the home most of the time working and thereby not available to care for the child's needs. It was assumed that the mother was the appropriate parent when considering the best interests of the child and especially in caring for children of "tender years."

This is reflected in the former Utah Child Custody Law which, from at least 1933 until 1977, read as follows:

> In any case of separation of husband and wife having minor children, or whenever a marriage is declared void or dissolved, the court shall make such order for the future care and custody of the minor children as it may deem just and proper. In determining custody, the court shall consider the best interests of the child and the past conduct and demonstrated moral standards of each of the parties (parents), and the natural presumption that the mother is best suited to care for young children. The court may inquire of the children and take into consideration the children's desires regarding the future custody; however, such expressed desires shall not be controlling and the court may, nevertheless, determine the children's custody otherwise (UCA 30-3-10).

In 1977 the court dropped the phrase "and the natural presumption that the mother is best suited to care for young children." Thus Utah law came to place and emphasis on the best interests of the child. California's law is very explicit in regards to best interests of the child. It states "There shall be a presumption ... that joint custody is in the best interests of a minor child .... If the court declines to enter an order awarding joint custody ... the court shall ... state the reasons why" (CC 4600.5 (79). As of 1987, 39 states specifically allowed for joint custody and/or stated that neither parent was to be preferred because of that parent's gender. In addition, case law has established in most all other states that neither parent shall be preferred because of the parent's gender (e.g. Utah).

With the concept of the best interests of the child, courts have

increasingly relied on the opinions of experts to help in the determination of custody. Concepts such as the "psychological parent", the "nurturant parent", and the "maintenance parent" all suggest the need for the opinions of mental health or child development experts. Clearly psychologists and other professionals are sought for today on a regular basis, to aid in custody determinations.

It is appropriate that we are having a symposium on professional standards at this convention. There may be a slight overlap between my paper and the paper of Dr. Skidmore since child sex abuse is now being raised by one of the parents at alarming rates at the time of divorce and custody determinations. I would like to give some very practical guidelines as to acceptable professional standards in conducting custody examinations.

1. If the psychologist is to do custody examinations and be an expert witness, his or her opinions should be grounded in objective data as much as possible. There is no place for the "hired gun" in any field. All too often mental health professionals are accused of being one sided, as working passionately for the side who is paying the bill and as ignoring other information. I have had lawyers ask me what expert they could hire to say the things they wanted said. I have learned that the lawyers, though they may use such experts to their advantage, typically have no respect for the person. It is a compliment when a lawyer from the opposing side later tells the psychologist that the lawyer was impressed with the psychologist's objectivity and thoroughness. And that hopefully someday the psychologist will be on a case where his opinions will be to that lawyer's advantage.

2. The easiest way to maintain one's objectivity is to be working as a friend of the court. I have been doing custody examinations for many years, and it is seldom that a lawyer objects to my insistence that if I am to do the examination, I want an order from the judge appointing me as a friend of the court. There are other advantages to this friend of the court procedure as well. The judge will order that all parties be examined by the psychologist, that relevant material will be made available to the psychologist and that the psychologist will have the right to talk to those relatives, friends, neighbors, employers, etc. for information that is needed to make broad-based, and informed opinions. Further, the psychologist will have easy access to the children, their school records, and other relevant material. Finally this procedure minimizes or eliminates the possible objections from the temporary custodial parent to the other parent being observed and examined together with the children in that parent's home or at the psychologist's office.

3. If the psychologist is working for the court (and the parents should know if this is the case), the psychologist is obligated to be primarily concerned with the best interests of the children and not the interests of the person who will be paying the bill. This also suggests that the psychologist is obligated to examine all parties. There are rare occasions where I have agreed to do an examination for just one side. (The most recent case involved the attempt of parents to retain custody of a child of whom the state wanted to assume custody and protection.) In these instances all the psychologist can properly do is form opinions as to the adequacy of that parent. The psychologist must not make comparative judgments either explicitly or by

innuendo. For example, in South Carolina courts are directed to protect the "best spiritual and other interests of the child." It would not be proper to suggest that the father (or mother) goes to church more often than the other parent and thus would be providing a better spiritual influence for the child. It would be proper to say that the father (or mother) is a regular church attender and desires that the child have a strong religious training and foundation.

It should be noted that if the psychologist is working as a friend of the court, the report belongs to the court. Only the judge can give him or her permission to release the report to anyone. The litigants do not have an inherent right to see the report.

In a similar vein, if the report has been sealed by the court, the psychologist should be very careful to never release the report to anyone, without specific permission of the court. And this is so regardless for whom the report was done.

While I am not clearly convinced one way or the other on the next point, my sense is that if the psychologist is working for just one side, then it is better that the other parent not be examined by the psychologist. It seems to me that to make a pretense of being objective by seeing all sides when in fact you are working for only one side, is a sham.

4. When I finish my first draft of a custody report, I review it with the perspective of pretending that I am being paid by the mother. Then I review it with the perspective that I am being paid by the father, and then that both parents are equally sharing in the bill. I modify my report until I

am satisfied as to what I have said regardless of who is paying the bill. Several lawyers with whom I work have developed the practice of one of them agreeing to forward the money to me with the parents being instructed not to disclose to me what portion of the bill each is paying. While this is more ideal than common, in cases it has happened and it is a welcome relief for me when it does. The point is, it is very easy to be biased toward the person who hires the expert and who is paying the bill. If the judge appoints the psychologist hopefully he or she will be viewing the case from the same vantage point as the judge, that is recognizing the importance of considering as much information, from as many different sources as possible, in determining what is best for the children, both in the short term as well as from the long term perspective.

5. It is critical that the examiner tries to put aside his or her own biases. There is no room for chauvinism, feminism, and religious or atheistic radicalism. The context of an examination is not the place for a psychologist to quarrel with the law as it is written or to advance his or her unique opinions.

Though it is fashionable to argue that if the parent's behavior does not directly affect the child, such behavior should not be considered by the court, this is not always the case. At least in Utah, the examiner is obligated to pay attention to the past conduct and demonstrated moral standards of each of the parents, regardless of the impact on the child of this behavior or these standards. For example, not long ago, a graduate student and I published an article which reviewed all the available literature on the impact

of the sexual orientation of divorced lesbian mothers on their children of whom they had custody. In general the studies showed that this sexual orientation had no adverse affect on the children. It would not be proper to ignore, or fail to report, such a mother's behavior. The court room is not the arena to introduce new concepts or try to change laws. This is done by membership on task forces and in legislative sessions.

Because of the lack of precision in understanding and predicting human behavior, it is easy to add one's own interpretations and opinions which are not well grounded in multiple data points.

6. It is important to inform in writing both parents as to the purpose of the examination, to whom the report will be sent, and what access to the written report, if any, the parents, will be permitted. The release form I have used in Utah is as follows:

> In participating in this examination, I understand that Dr. Howell will assess and give opinions about the custody of, and visiting rights with, my child or children in accordance with the current Utah law about child custody. I understand he will gather and convey to the court information about the best interests of my child or children and the past conduct and demonstrated moral standard of each of the parents. I understand that he may contact people who know me, and include such information in his report. Further I understand that the details of the report will not be made available to me nor will I have the opportunity to read the report.

It should be noted that the participants in the custody examinations, which I conduct, are not allowed to read the report and the lawyers are instructed not to share with them the details of my report. I have mixed feelings about this practice. On the one hand, I think a person should be allowed to have available to him or her all the information which may be used for the court to make a judgment. On the other hand, if the judge so desires, the attorneys are allowed to read the report and they also have the right to discuss with their clients what recommendations I may have made.

Next, it simply is not fair to children for them to be asked about their feelings and attitudes toward their parents if the parents are going to be made aware of what they said. Further, for one parent to know what the other parent said about them only fans the flames of an already difficult situation. Finally, if friends and neighbors are to give honest opinions, they need to be assured that what they say will not get back to the litigants. I had one neighbor tell me that living next door to the father and his new family was like being in an X-rated movie. He then went on to give specific details to bolster his assertion. Interestingly, it was the father, who had asked me to contact this neighbor. Still I worry that my practice offends due process of the parents.

I also have each parent sign a statement to the effect that he or she understands I will be contacting the people they ask me to. When they give me the name and phone number of a person to contact, I write down the person's name and have the parent initial by the person's name.

7. It is important that each parent be examined separately and if

possible in company with his or her children. I usually use a room which is equipped with audio capabilities and one-way mirrors.

8. It is also important that each child be examined separately. I seldom give tests to children, unless there is a question of mental retardation, very high intelligence, brain damage, or some particular behavior or personality problem with which one parent might be able to better cope than the other parent.

In respect to tests, I typically give a brief intelligence test to each parent, occasionally a screening test for organic cerebral dysfunction, and typically one or two objective personality tests. There may be specific issues which psychological tests will address, but the most important data will come from interviewing, observation, collateral data (court and family services records, school records, and occasionally medical records) and interviewing of relatives, neighbors, employers, etc. If enough information is gathered, it often becomes apparent which parent is best suited to meet the children's needs. In reference to personality tests, it should be remembered that it is the rule to get a high negative F--K ratio on the Minnesota Multiphasic Personality Inventory. Parents want to look their best at the time of examination. (On occasion I have wondered what an M.M.P.I. on a person rated by the estranged or former spouse would look like, but I have never had the courage to try that.)

9. The issue of fees needs to be considered. I think the best policy is to ask for a down payment from the lawyer or the parent and to expect the total bill to be paid before the report is released to the court. If the

psychologist is going to testify, those costs should be included. It is definitely true that people have less bitterness if they don't also have a bill to pay after the court hearing. In addition, having the financial concerns out of the way helps the psychologist in his or her objectivity. It is not unusual for me to spend as many as twenty hours conducting an examination such as I have described above. So it is obvious that such examinations are not inexpensive.

10. If the issue of child abuse or child sex abuse is raised by any of the parties, that part of the examination should be conducted with a video tape being made. It should be remembered that from 30 to 50 percent of child abuse accusations which are made at the time of divorce or custody turn out to be fictitious and often maliciously false. Skepticism and an open mind are necessary virtues for a psychologist doing custody examinations, including instances where child abuse is being alleged.

In summary, empirical data have shown that dissatisfaction with custody examinations is a frequent source of complaints to state and national ethics committees. Hopefully the procedures, such as I have outlined above, will yield greater consumer satisfaction and higher professional standards.

Robert J. Howell, Ph.D.

Diplomate in Clinical Psychology
American Board of Professional Psychology

Diplomate in Forensic Psychology
American Board of Forensic Psychology

CUSTODY EXAMINATION AGREEMENT

In participating in this examination, I understand that Dr. Howell will assess and give opinions about the custody of and visiting rights with my child or children in accordance with the current Utah law about child custody. I understand he will gather and convey to the court information about the best interests of my child or children and the past conduct and demonstrated moral standard of each of the parents. I understand that he may contact people who know me, and include such information in his report. Further I understand that the details of the report will not be made available to me nor will I have the opportunity to read the report.

.....

Signature

.....

Date

Robert J. Howell, Ph.D.

Diplomate in Clinical Psychology
American Board of Professional Psychology

Diplomate in Forensic Psychology
American Board of Forensic Psychology

STATEMENT OF UNDERSTANDING

.....

Date

I understand that Dr. Howell may be contacting the following sources listed below to obtain information regarding contact, evaluations, treatment and opinions about me.

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